

# Reasonable Fear Review Outline

## **I. Sources of Authority**

- No INA provisions.
- 8 C.F.R. §§ [208.31](#), [1208.31](#).
- [Immigration Court Practice Manual \(ICPM\), Chapter 7.4\(e\)\(iv\)](#).

## **II. Background/Process for how a reasonable fear review gets before the IJ**

- There are two relevant classes of aliens who are generally subject to expedited removal:
  - i. INA § 238(b): Aliens who are not lawful permanent residents and who DHS determines have been convicted of an aggravated felony.
  - ii. INA § 241(a)(5): Aliens who have previously been ordered removed and whose removal order is being reinstated.
- However, an alien who *either* (1) is a non-LPR aggravated felon who has been issued a final administrative order of removal under 8 C.F.R. § 238.1 or (2) receives notice under 8 C.F.R. § 241.8 that his or her previous removal order is being reinstated *and* who expresses a fear of return to the country of removal is referred for a reasonable fear interview before an asylum officer. 8 C.F.R. §§ 208.31(a)-(b), 1208.31(a)-(b).
  - i. The asylum officer's determination should be conducted within 10 days of referral unless there are "exceptional circumstances." 8 C.F.R. §§ 208.31(b), 1208.31(b).
  - ii. Standard of review
    1. The asylum officer's review is limited to a determination of whether or not the alien expressed a reasonable fear of persecution or torture. 8 C.F.R. §§ 208.31(c), 1208.31(c).
    2. "Reasonable fear of persecution" is defined as "a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal." 8 C.F.R. §§ 208.31(c), 1208.31(c).
      - a. "The "reasonable fear" screening standard is *higher* than the "significant possibility" standard applicable to credible fear review, reflecting the "significantly higher" "likelihood" standard of proof for withholding of removal applications as compared to the "well-founded fear" standard for asylum. 64 Fed. Reg. 8485.
    3. The asylum officer does not consider the possible impact of any bars to eligibility. 8 C.F.R. §§ 208.31(c), 1208.31(c).
  - iii. Representation and evidence
    1. At the interview, the alien may be represented, at no expense to the government, by either counsel or an accredited representative. 8 C.F.R. §§ 208.31(c), 1208.31(c).

2. The alien may present evidence that is both available and relevant. 8 C.F.R. §§ 208.31(c), 1208.31(c).
    - a. Additionally, the counsel or accredited representative may make a statement at the end of the interview. 8 C.F.R. §§ 208.31(c), 1208.31(c).
      - i. However, the asylum officer may “place reasonable limits on . . . the length of the statement. 8 C.F.R. §§ 208.31(c), 1208.31(c).
  - iv. Documentation of the interview
    1. “The asylum officer shall create a summary of the material . . . [and] review the summary with the alien and provide the alien with an opportunity to correct errors therein. The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officers, and the officer's determination of whether, in light of such facts, the alien has established a reasonable fear of persecution or torture.” 8 C.F.R. §§ 208.31(c), 1208.31(c).
- If the asylum officer makes a positive reasonable fear finding and determines that the alien has a reasonable fear of persecution or torture in the country of removal:
    - i. The asylum officer issues the alien a Form I-863, Notice of Referral to the Immigration Judge, and refers the case to the immigration court for withholding-only proceedings. 8 C.F.R. §§ 208.31(e), 1208.31(e).
      1. In withholding-only proceedings, the court may consider only whether or not the respondent is eligible for withholding of removal or deferral of removal under the Act and the Convention Against Torture. 8 C.F.R. § 1208.2(c)(2),(3)(i).
  - If the asylum officer makes a negative reasonable fear finding and determines that the alien does not have a reasonable fear of persecution or torture in the country of removal:
    - i. The officer “shall inform the alien in writing of the decision.” 8 C.F.R. §§ 208.31(f), 1208.31(f).
    - ii. The officer shall also issue the alien a Form I-898, Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, for him or her to indicate whether or not he or she wishes to have the determination reviewed. 8 C.F.R. §§ 208.31(f), 1208.31(f).
    - iii. If the alien does not request a review before the immigration judge, then DHS will execute the underlying administrative removal order or the reinstatement of the prior removal order.

### **III. Initiation of Reasonable Fear Review Proceedings**

- An alien with a negative reasonable fear finding may have that determination reviewed by an Immigration Judge by indicating his or her desire for a review on the Form I-898 provided by the asylum officer.

- This limited proceeding is initiated by filing the following documents with the court:
    - i. A copy of the Form I-863, Notice of Referral
    - ii. The asylum officer's notes
    - iii. A summary of the material facts relied on by the asylum officer
    - iv. Any other materials the asylum officer relied on when making the officer's determination
- 8 C.F.R. §§ 208.31(g), 1208.31(g).

#### **IV. Reasonable Fear Review Procedure**

- Unlike credible fear review proceedings, the regulations do not provide any specific procedural requirements for reasonable fear review proceedings. *See generally* 8 C.F.R. §§ 208.31, 1208.31.
- Timing
  - i. The Immigration Judge shall conduct the reasonable fear review “within 10 days of the filing of the Form I-863 with the immigration court” unless there are “exceptional circumstances.” 8 C.F.R. §§ 208.31(g); 1208.31(g); ICPM, Chapter 7.4(e)(iv)(A).
    1. Any request for a continuance by the parties is subject to the ten day statutory time limit. *See* ICPM, Chapter 7.4(e)(iv)(E).
- Logistics
  - i. As with credible fear reviews, the Immigration Court shall create a Record of Proceeding that is separate and apart from the record for any subsequent proceedings involving the same alien. ICPM, Chapter 7.4(e)(iv)(D).
  - ii. Hearing
    1. A reasonable fear review may be held in person, telephonically, or via video teleconference (VTC). ICPM, Chapter 7.4(e)(iv)(B).
      - a. For more information on VTC or hearings by telephone, *see* ICPM, Chapter 4.7, Hearings by Video or Telephone Conference.
    2. The hearing is recorded. ICPM ¶ 7.4(e)(iv)(E).
    3. The hearing is closed to the public unless the alien consents on the record or in writing. 8 C.F.R. § 1208.30(g)(2)(iii).
    4. The court will provide the alien with an interpreter if necessary. ICPM, Chapter 7.4(e)(iv)(E).
- Evidence
  - i. The Immigration Judge may consider “[t]he record of determination, including copies of the Form I–863, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination.” 8 C.F.R. §§ 208.31(g); 1208.31(g).
  - ii. The parties may also provide “oral or written statements” as well as other evidence at the discretion of the Immigration Judge. ICPM, Chapter 7.4(e)(iv)(E).

- Representation
  - i. The regulations provide that an alien may be represented during the reasonable fear interview before an asylum officer, but they are silent regarding representation during the immigration court's reasonable fear review.
    - 1. The ICPM provides that alien representation is "subject to the immigration judge's discretion." ICPM, Chapter 7.4(e)(iv)(C).
  - ii. The general immigration court procedures provide:
    - 1. DHS may be represented. 8 C.F.R. § 1003.16(a).
    - 2. Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. § 1003.16(b).
- Standard of Review
  - i. A reasonable fear review "is a review of the DHS asylum officer's decision." ICPM, Chapter 7.4(e)(iv)(3). It "is not as comprehensive or in-depth as a withholding of removal hearing in removal proceedings." *Id.*
  - ii. The regulations are silent regarding whether or not the review is de novo or according to some other standard.
  - iii. The Immigration Judge's review is limited to whether or not the alien has a reasonable fear of persecution or torture, meaning there is a reasonable possibility that the alien would be subjected to persecution on account of a protected ground or to torture.
- IJ Decision
  - i. At the end of the review, the Immigration Judge must promptly complete the credible fear worksheet and issue a decision using the following standard form "Order of the Immigration Judge, In: Reasonable Fear Review Proceedings."
  - ii. If the Immigration Judge finds that the alien does in fact have a reasonable fear, then he or she vacates the asylum officer's determination, and the alien is placed in withholding-only proceedings.
    - 1. The alien may submit a Form I-589 Application for Asylum and Withholding of Removal. 8 C.F.R. §§ 208.31(g)(2); 1208.31(g)(2).
      - a. However, the court may only consider the relief of withholding of removal (including deferral of removal) under the Act and under the Convention Against Torture. 8 C.F.R. §§ 208.31(g)(2); 1208.31(g)(2).
  - iii. If the Immigration Judge finds that the alien does not have a reasonable fear, then the Immigration Judge concurs with the asylum officer's determination and returns the respondent to the custody of DHS for execution of the underlying removal order.
    - 1. The judge should provide a brief explanation for his or her reasoning in the available space on the reasonable fear order.
- Appeal

- i. The regulations provide that “[n]o appeal shall lie from the Immigration Judge’s decision.” 8 C.F.R. §§ 208.31(g)(1), 1208.31(g)(1); ICPM, Chapter 7.4(e)(vi).
  - 1. However, the Ninth Circuit has held that respondents may appeal an Immigration Judge’s reasonable fear determination by filing a petition for review directly with the Circuit Court. *See Martinez v. Sessions*, No. 14-70339, 2017 WL 3083135 (9th Cir. July 20, 2017) (explaining that INA § 242, which provides judicial review over final orders of removal, provides authority for the court to review reasonable fear orders); *Ayala v. Sessions*, 855 F.3d 1012 (9th Cir. 2017) (finding jurisdiction to review reasonable fear determinations in the context of expedited removal orders); *Andrade-Garcia v. Lynch*, 828 F.3d 929 (9th Cir. 2016) (finding jurisdiction to review reasonable fear determinations in the context of reinstatement of “ordinary” removal orders and holding that the Immigration Judge’s negative reasonable fear finding was supported by “substantial evidence”).
- ii. Unlike the regulations regarding credible fear determinations, the regulations are silent regarding DHS reconsideration of an asylum officer’s negative reasonable fear finding.